Supreme Court, U.S.
FILED
DEC 31 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

December Term, 1971.

No. 71-5946

REINALDO CARABALLO,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

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IN THE

SUPREME COURT OF THE UNITED STATES.

DECEMBER TERM, 1971

NO.

REINALDO CARABALLO, *et al.*

Petitioner,

-v-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner, R.C., respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, affirming judgment of the United States District Court for the Southern District of New York.

OPINION BELOW

There was no opinion in the District Court, and the Court of Appeals affirmed the judgment of the District Court without opinion.

JURISDICTION

The date of the judgment sought to be reviewed is October 7, 1971. It was entertained the same date.

The jurisdiction of this Court is invoked pursuant to the provisions of Title 28, §1254, United States Code.

STATEMENT OF THE CASE

(a) PRELIMINARY STATEMENT

Reinaldo Caraballo appeals from a judgment of conviction entered on June 4, 1971, in the United States District Court for the Southern District of New York after a jury trial before the Honorable

Edward Weinfeld. Caraballo was convicted of two counts of selling narcotics not in pursuant of the requisite written order form issued by the Secretary of the Treasury in violation of 26 U.S.C. §4705(a). He was sentenced to prison for the minimum mandatory period of five years pursuant to the provision of 26 U.S.C. §7237(b).

(b) THE INDICTMENT

The Grand Jury charged that on January 16, 1969, and on January 17, 1969, Caraballo unlawfully gave away or sold 0.26 grams and 21.03 grams, respectively, of cocaine hydrochloride to Dennis Nargi (an undercover Narcotics Agent) not in pursuant of a written order form issued by the Secretary of the Treasury of the United States. A co-defendant, Julio Rivera, was indicted on the first count as an aider and abettor.

(c) PRE-TRIAL HISTORY:

The crimes charged were allegedly committed on January 16 and January 17, 1969. Caraballo was arrested on June 4, 1969. He was charged under 21 U.S.C. §173, 174 (the illegal importation of narcotics statute).

Caraballo agreed to cooperate with the Narcotics Bureau with the understanding that if his cooperation was satisfactory there was a strong possibility of the Government substituting a tax count.

The case was adjourned by the Government on 22 occasions before the Commissioner's Court. At no time were the defendants or their attorneys in said Court.

In February, 1971, the defendants were indicted, not for violation of 21 U.S.C. §173, 174, as charged in the

complaint but for violation of the order form statute. They pleaded not guilty and went to trial on April 28, 1971, and were convicted by a jury on April 30, 1971.

(d) THE PRE-TRIAL MOTION TO DISMISS.

Defendants moved prior to trial to dismiss the indictment pursuant to the Sixth Amendment of the United States Constitution and Rule 48(b) of the Federal Rules of Criminal Procedure, for failure of the Government to grant a speedy trial.

The motion was orally argued on April 16, 1971, and the testimony of the defendants' attorneys as well as the testimony of the former Assistant United States Attorney in charge of the case was heard on April 19, 1971.

The testimony indicated that the Assistant United States Attorney, Mr. Johnson, in charge of the prosecution at that time, met with Caraballo's attorney a few days after Caraballo's arrest in June, 1969, and indicated that with Caraballo's cooperation there was a good possibility of a substituted tax count carrying no minimum mandatory sentence. Mr. Johnson thereafter consented to permitting Caraballo to resume his employment as a merchant seaman provided he did not sail outside of the Western hemisphere.

The case was continually adjourned by the prosecutor. In July, 1970, Mr. Johnson, in a conversation with Caraballo's attorney, stated that inasmuch as more than one year had elapsed and he (Mr. Johnson) having

heard nothing to the contrary, assumed that Caraballo's cooperation was satisfactory.

Mr. Johnson testified that in these types of cases the narcotics agents were required to forward to the United States Attorney's office a number of status reports. If a defendant was not cooperating to the satisfaction of the Bureau of Narcotics the status reports would so indicated and the United States Attorney would then expedite the prosecution. Mr. Johnson testified that he received no such report in this case at any time and assumed that Caraballo was cooperating.

After this testimony was completed, Judge Weinfeld found that the Assistant United States Attorney was under the impression that the defendants were cooperating with the Bureau of Narcotics

which accounted for the prolonged delay before the Commissioner's Court. In reliance theron, defense counsel did not make a prior demand for dismissal of the complaint. He denied defendants' motion, however, solely upon his findings that the defendants failed to show prejudice at that time, without prejudice to the right of defendants to renew the motion at the trial, at which time the Court could better determine whether or not there had been in fact prejudice to the defendants.

(e) TRIAL TESTIMONY

(1) *The Government's Case in Chief:*

The Government's case relied upon the testimony of Special Agent Nargi of the Bureau of Narcotics. He testified that on January 16, 1969, in the company of Agent Moser (who was never called as a witness by the prosecution) he met the

co-defendant, Julio Rivera, who introduced Caraballo to them (123). After Rivera left them, Caraballo gave Agent Nargi a sample of cocaine and agreed to meet him the next day for the purpose of selling him an ounce of cocaine for 600 dollars.

The following day the two agents met Caraballo and at his insistance they drove, by automobile, to the Casa Moneo (a Spanish specialty store) where Caraballo, in company with the agents, entered said store. Caraballo then walked to the rear of the premises and weighed a package containing the cocaine on a scale. After they left the store, Nargi gave Caraballo 600 dollars for the one ounce of cocaine.

On cross-examination, Nargi stated that he might have talked to Caraballo at that particular time about a big card game in New Jersy, and that he might have

told Caraballo that he was a gambler.

(2) *The Defense*

Caraballo testified on his own behalf. He was a seaman with the Grace Line and has no prior criminal record. He met Nargi on only one occasion. That Nargi was introduced to Caraballo as a gambler from New Jersey. They discussed a card game that was to take place the next day. Caraballo agreed with Nargi that he (Caraballo) was to mark a deck of Spanish playing cards for that event. He believed Nargi and Moser to be gamblers. Caraballo told Nargi he could purchase the necessary deck of Spanish playing cards at the Casa Moneo nearby. They drove to that location in the Cadillac operated by Moser. Caraballo, alone, entered the large store, walked up to a near by counter and purchased an American and a Spanish

deck of playing cards from a sales girl named Isabel whom he could recognize; he had a conversation with her while purchasing the playing cards. He left the store and rejoined the agents outside. They arranged to meet with Caraballo the next day for the card game but the agents never appeared. Caraballo denied meeting Narqi again until after his arrest five months later. After his arrest on June 4, 1969, Caraballo agreed to cooperate with the Bureau of Narcotics after being threatened with five years imprisonment.

Jesus Moneo, the owner of the Casa Moneo for 42 years testified that he sold Spanish playing cards in his establishment. These cards were sold in the gift department in the front of the store. That the Casa Moneo is 135 feet long.

That the only scales upon the premises were all the way in the rear and those scales were not available to customers and were on a counter which was always attended by his employees.

(3) *Government's Rebuttal Testimony*

The Government produced Special Agent Gill who testified that after his arrest Caraballo orally admitted selling an ounce of cocaine to Agent Nargi.

Caraballo denied any recollection of making such an admission.

Agent Nargi was recalled and he testified over objection that on January 24, 1969, co-defendant Rivera introduced Nargi to a third person who offered to sell cocaine to Nargi for 600 dollars an ounce. There was no proof whether this transaction ever occurred. Caraballo was not present at those times.

(4) *Renewed Motion to Dismiss*

After testimony was completed Caraballo renewed his motion to dismiss based upon the delay (370). At this time the defense cited the specific prejudice resulting from the delay. The Court denied the motion.

ARGUMENT

POINT ONE

THE DENIAL OF APPELLANT'S MOTION TO DISMISS FOR FAILURE TO GRANT A SPEEDY TRIAL WAS ERROR.

The delay in this case, from the arrest on June 4, 1969 (five months after the alleged crime was committed) until indictment, was approximately twenty months.

Ordinarily, four factors are relevant to a consideration of whether a denial of a speedy trial assumes due process proportions:-

(1) Length of delay;

(2) The reason for the delay;

(3) Prejudice to the defendant;

(4) Waiver by defendant.

See, *United States v. Fay*, 311 F. 2d 620, 621 (1963); *United States v. Smalls*, 438 F. 2d 711, 713 (1971); *United States ex rel. Solomon v. Manzoni*, 412 F. 2d 88, 90 (1969); *Hinton v. United States*, 424 F. 2d 876, 880 (1969).

In the case at bar, the Court below found all of the requisites present with the exception of prejudice to the defendant.

The Court below found that the defendant's attorney relied upon representations by the Assistant United States Attorney that Caraballo was cooperating with the Bureau of Narcotics and upon

such reliance the defendant failed to make a prior demand for trial. Therefore, the demand rule in *United States v. Lustman*, 258 F. 2d 475 (1958) is no bar to a dismissal.

The sole question for decision is whether the Court below erred in finding that there was no prejudice resulting from an improper delay.

There is no touchstone to determine prejudice and whether a delay results in a denial of a defendant's rights. It requires an analysis of the particular circumstances of each case. *Hedgepeth v. United States*, 364 F. 2d 684, 687 (1966).

At the trial there was a direct conflict of testimony between Caraballo and Agent Nargi. Interestingly, the only other eye-witness, Agent Moser, was

never called as a Government witness. The conflict in the testimony involves the relationship between Caraballo and Agent Nargi -- were they engaged in a gambling enterprise or in a drug sale transaction. Crucial to this issue was what occurred at the Casa Moneo. If, as Caraballo says, he entered the Casa Moneo to purchase decks of playing cards, it would substantiate the former relationship. If, on the other hand, as Nargi testified, Caraballo didn't purchase any decks of cards but rather entered the store to weigh a package containing drugs, this would substantiate the Government's contention.

A key witness on this very point, without any ties to either side, was Isabella Perez, an employee at the Casa Moneo on the day of the alleged crime

with whom Caraballo claims he had a conversation and from whom he purchased the decks of playing cards. She was available for more than a year after the commission of the alleged crime but her whereabouts were unknown at the time of trial 27 months later. Thus, the defendant Caraballo has demonstrated specific prejudice to his defense caused by the lengthy and unnecessary delay occasioned by the mix-up in the communication between the offices of the United States Attorney and the Bureau of Narcotics.

In a recent case this Court stated that the unavailability of a potential defense witness might be prejudicial. *United States v. Smalls*, *supra* at 714. See, also, *United States v. Feinberg*, 383 F. 2d 60, 65 (1967) (prejudice may arise if a key defense witness or valuable

evidence is lost.). *United States v. Mark II Electronics of Louisiana, Inc.*, 305 F. Supp. 1280, 1283 (1969) (prejudicial effect of a long delay is a weakening of a defendant's ability to adequately defend himself because of the absence of witnesses.). *United States v. Capaldo*, 402 F. 2d 821, 823 (1968) (this court in finding no prejudice specifically noted that no witnesses were lost.).

While the rule in this Circuit appears to be that the statute of limitations is a primary guarantee against pre-indictment prejudice, if a defendant can show actual prejudice then a violation is established warranting a dismissal of the indictment. *United States v. Dallago*, 311 F. Supp. 227, 235 (1970); *United States v. Alo*, 439 F. 2d 751, 755 (1971).

of. The importance of the right to a speedy trial is emphasized by the recent change in the *Second Circuit Rules Regarding Prompt Disposition of Criminal Cases* effective July 5, 1971, requiring dismissals without showing prejudice after six months from date of arrest.

ARGUMENT

POINT TWO

THE INTRODUCTION OF EVIDENCE OF THE CO-DEFENDANT'S INVOLVEMENT IN A NON-COMPLETED, SIMILAR SUBSEQUENT TRANSACTION, NOT INVOLVING THE DEFENDANT CARABALLO, DEPRIVED DEFENDANT OF A FAIR TRIAL.

In rebuttal to the testimony of the co-defendant, Rivera, Agent Nargi testified that a week after the crime alleged in the indictment, Rivera called him and offered to introduce him to a person who could sell him cocaine. Subsequently, a meeting took place with Nargi, Rivera

F 2d 114 (1967); *United States v. Johnson*, 382 F. 2d 280, 281 (1967).

However, similar acts of misconduct performed by one person cannot be used to infer a guilty intent of another person who is not shown to be in any way involved in the prior misconduct. *United States v. DeCicco*, 435 F. 2d 478 (1970).

Where the probative value is slight and the prejudice is great, the Court should exclude the evidence. *United States v. Knohl*, 379 F. 2d 427 (1967).

The testimony should have been rejected inasmuch as it did not concern a completed crime but only a possible cocaine sale. There was no evidence that the criminal transaction ever occurred. See, *United States v. Adams*, 385 F. 2d 548, 551 (1967) (a conviction was reversed

where an agent testified to a possible heroin sale that never transpired.).

This testimony of Nargi should have been rejected since it concerned an event which occurred subsequent to the crime charged in the indictment. It is distinguishable from most cases on this point which involve similar *prior* acts of misconduct which are admitted to prove subsequent intent. It is less reliable to infer a person's prior intent from a future act then it would be to infer a present intent from a prior act. Although *United States v. Cuadrado*, 413 F. 2d 633 (1969), allowed evidence of a subsequent sale, there it was a completed sale and went to rebut a defense of alibi. It is clearly distinguishable from the case at bar.

Considering that the proceeding below involved a joint trial, and the evidence concerned a subsequent act of the co-defendant in no way involving Caraballo, the reasons for rejecting the testimony far outweighed its limited probative value to Rivera's intent at a prior time. The Court's limiting instruction in no way removed the obvious prejudice to Caraballo's defense.

Therefore, the facts demonstrate that the defendant Caraballo was prejudiced by the unnecessary failure to provide him with a speedy trial and by the introduction of evidence of the co-defendant's subsequent acts.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully Submitted,

ARNOLD L. GREENBERG
Attorney for Petitioner
Reinaldo Caraballo

APPENDIX A — JUDGMENT

UNITED STATES COURT OF APPEALS
For The Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the seventh day of October one thousand nine hundred and seventy-one.

Present: Hon. Leonard P. Moore,
Hon. Paul R. Hays,
Hon. Wilfred Feinberg,

United States of America,

Plaintiff-Appellee,

-v-

Reinaldo Caraballo and
Julio Rivera,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Sourthern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

(Seal)

A. Daniel Fusaro,
Clerk

APPENDIX B — RECALL OF MANDATE

UNITED STATES COURT OF APPEALS
Second Circuit

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the ninth day of November, one thousand nine hundred and seventy-one.

United States of America,

Plaintiff-Appellee,

-v-

Reinaldo Caraballo and Julio Rivera,

Defendants-Appellants.

It is hereby ordered that the motion made herein by counsel for the appellant Julio Rivera, by notice of motion dated November 10, 1971, to recall the mandate and stay its reissuance pending application to the Supreme Court of the United States for a writ of certiorari pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, and to be continued in the $5,000.00 personal recognizance bond, be and it hereby is granted.

Leonard P. Moore
Paul R. Hays
Wilfred Feinberg
Circuit Judges